UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

GEORGE E. CHAPDELAINE

v. C.A. No. 97-160T

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER

Ernest C. Torres, United States District Judge.

George Chapdelaine has moved, pursuant to 28 U.S.C. § 2255, to vacate his sentence for using and carrying a firearm in violation of 18 U.S.C. § 924(c)(1). For reasons hereinafter stated, the motion is denied.

Background

In December 1991, a jury found Chapdelaine guilty of various offenses relating to his attempt to rob an armored truck. One of those offenses was using and carrying firearms during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1) which mandates a five-year consecutive term of imprisonment.

On all of the counts of conviction, except the § 924(c)(1) violation, concurrent sentences of imprisonment were imposed, the longest of which was 78 months. On the § 924(c)(1) conviction, Chapdelaine received the additional five-year consecutive sentence mandated by the statute.

On appeal, Chapdelaine's conviction and sentence were affirmed. United States v. Chapdelaine, 989 F.2d 28 (1st Cir. 1993). Later, Chapdelaine's petition for certiorari was denied. Chapdelaine v. United States, 510 U.S. 1046, 114 S.Ct. 696 (1994).

In his § 2255 motion, Chapdelaine challenges his conviction under § 924(c)(1) on the ground that the trial court's instruction to the jury regarding "use" of a firearm was erroneous in light of the

Supreme Court's intervening decision in Bailey v. United States, 516 U.S. 137, 116 S.Ct. 501 (1995), which requires proof that the firearm was actively employed. In response to the government's objection, Chapdelaine also argues that the evidence was insufficient to support a conviction for "carrying" a firearm; and that, in any event, the jury was not properly instructed concerning the "carrying" prong of the statute.[1]

Chapdelaine did not object to the jury charge regarding the § 924(c)(1) violation. Nor did he claim, on appeal, that the charge was erroneous. His failure to do so was understandable since the charge was consistent with the law in this circuit at the time of trial. See, e.g., United States v. Hadfield, 918 F.2d 987 (1st Cir. 1990).

Chapdelaine's § 2255 motion was referred to a United States Magistrate Judge who recommended that it be denied as untimely. Chapdelaine filed an objection to the magistrate's recommendation. This court rejected that recommendation and referred the motion back to the magistrate judge for a recommendation on the merits. Chapdelaine v. United States, 31 F.Supp.2d

[1] The instruction regarding the § 924(c)(1) violation was, in pertinent part, as follows:

> [W]hen we say used a firearm or had a firearm, it means having a firearm or firearms available to assist or aid in the commission of a crime and to determine whether the defendant used or carried a firearm, you can consider all the factors received in evidence in the case including the nature of the underlying crime or violence alleged, the proximity of the defendant to the firearm in question, the usefulness of the firearm to the crime alleged and the circumstances surrounding the presence of the firearm.
>
> It's not necessary to show that the defendant actually displayed the firearm. But the government has to prove beyond a reasonable doubt that the firearm was in the defendant's possession or under the defendant's control at the time of the crime of violence, at the time here in the agreement.

United States v. Chapdelaine, Cr. 91-31-02P, Tr. (12/11/91) at 124-25.

241, 245 (D.R.I. 1999).

However, the First Circuit's subsequent decision in Brache v. United States, 165 F.3d 99 (1st Cir. 1999), makes it clear that Chapdelaine's motion should be denied because he failed to challenge the jury charge in his direct appeal and he has neither demonstrated "cause" and "prejudice" for that failure nor made any showing of "actual innocence". Id. at 102 (citing Murray v. Carrier, 477 U.S. 478, 485, 496, 106 S.Ct. 2639 (1986)).

Discussion

In Brache, the defendant sought relief, under § 2255, from a pre-Bailey conviction for "using" or "carrying" in violation of § 924(c)(1). Like Chapdelaine, Brache argued that the jury instruction regarding "use" was contrary to the definition subsequently articulated by the Supreme Court in Bailey. Although it was undisputed that the evidence failed to establish that Brache's "use" of the firearm satisfied the requirements of Bailey, the district court denied Brache's motion on the ground that the evidence was sufficient to support a conviction under the "carry" prong of § 924(c)(1).

The First Circuit affirmed, but for a different reason. It agreed that the evidence was sufficient to convict Brache for "carrying"; but since it found it impossible to determine whether the jury decided that Brache "carried" the firearm, it assumed that Brache was convicted only on the "use" prong. However, relying on the Supreme Court's decision in Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604 (1998), the Court of Appeals held that Brache would be entitled to relief only if he could demonstrate either "cause" and "prejudice" for failing to raise the issue on appeal; or, alternatively, that he was "actually innocent."

In Bousley, the Supreme Court rejected the argument that, until Bailey, the offense of "using" a firearm was not understood; and, therefore, Bousley's pre-Bailey plea of guilty to "using"

was unintelligent. The Court stated:

> While we have held that a claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause for a procedural default, Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910 (1984), petitioner's claim does not qualify as such. * * * Indeed, at the time of petitioner's plea, the Federal Reporters were replete with cases involving challenges to the notion that "use" is synonymous with mere "possession."

Id. at ___, 118 S.Ct. at 1611.

In Brache, the Court of Appeals applied the reasoning of Bousley to cases in which a defendant, who was convicted after trial, fails, on appeal, to contest the jury instructions regarding "using". More specifically, it held that the fact that the instruction was consistent with the law as it existed at the time of trial did not establish "cause" for the petitioner's failure to raise the issue. Id. (quoting Bousley, 523 U.S. at ___, 118 S.Ct. at 1611). Because the court also found that Brache had failed to demonstrate "actual innocence", it denied his § 2255 motion. Id.

Brache is dispositive of Chapdelaine's motion. The fact that the jury instruction regarding "using or carrying" was consistent with what was, then, the law in this circuit does not establish "cause" for Chapdelaine's failure to challenge the § 924(c)(1) instruction at trial or on appeal. Id.

Moreover, Chapdelaine has failed to demonstrate "actual innocence". On the contrary, the evidence clearly indicates that Chapdelaine was guilty of "carrying" a firearm.

" 'Actual innocence' means factual innocence, not mere legal insufficiency." Bousley, 523 U.S. at ___, 118 S.Ct. at 1612 (citing Sawyer v. Whitley, 505 U.S. 333, 339, 112 S.Ct. 2514, 2518-19 (1992)). In order to establish "actual innocence", a defendant must "demonstrate that, in light of all the evidence it is more likely than not that no reasonable juror would have convicted him." Id. (internal quotations omitted).

It is settled law that one who conveys firearms in a vehicle is deemed to "carry" them. Muscarello v. United States, 524 U.S. 125, ___, 118 S.Ct. 1911, 1913-14 (1998). Here, the evidence is that, prior to the planned armored-truck robbery, Chapdelaine and his three co-defendants rendevoused in a parking lot; that Chapdelaine removed an opaque green laundry bag from the trunk of his car; that the laundry bag was placed in a stolen Jeep Wagoneer that was to be used in the planned robbery; and that the bag, containing firearms, was later recovered from a co-defendant's vehicle. Chapdelaine, 989 F.2d at 30-31. The First Circuit already has determined that this evidence was sufficient to establish that Chapdelaine possessed the firearms in the bag and that he intended to have them available for use during or immediately following the planned robbery. Id. at 33-34. It also is sufficient to establish the offense of "carrying" and to negate any assertion of "actual innocence" by Chapdelaine.

Conclusion

For all of the foregoing reasons, Chapdelaine's § 2255 motion is denied.

IT IS SO ORDERED.

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Ernest C. Torres
United States District Judge

November , 1999